Boston College Environmental Affairs Law Review

Volume 31
Issue 3 *Economic Dynamics of Environmental Law and the Static Efficiency*

Article 10

1-1-2004

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THE UTILITY AND EFFICACY OF THE RLUIPA: WAS IT A WASTE?

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Abstract: The Religious Land Use and Institutionalized Persons Act was Congress's second attempt to undo the Supreme Court's decision in *Employment Division, Department of Human Resources v. Smith*, and thus increase the level of scrutiny used in evaluating land use laws under the Free Exercise Clause. This Note first analyzes the constitutionality of the Act, concluding that the Supreme Court would likely find the Act unconstitutional, even though lower federal courts may hesitate to do so. Second, regardless of the constitutionality of the Act, this Note concludes that it does not serve the purpose it was designed for, as the exceptions written into *Smith* cover the situations the Act was designed to "protect." More detrimentally, the mere existence of the Act dissuades further development of free exercise jurisprudence.

INTRODUCTION

This Note examines the Religious Land Use and Institutionalized Persons Act (RLUIPA),[1] a statute at the intersection of the First Amendment and land use law. After discussing the Act's history and the constitutional debate surrounding its constitutionality, this Note analyzes how Congress's decision to focus its attention on the friction between religious groups and land use laws shapes evolving free exercise jurisprudence. The conclusion reached is that, while most federal courts would likely find the RLUIPA constitutional, it may still be both redundant in effect, and unnecessarily stultifying to the development of free exercise jurisprudence.

Part I of the Note will examine the legislative history of the Act, including previous congressional attempts to pass religious liberty legislation and the jurisprudential context in which the RLUIPA arose. Part II will examine the question of whether or not the statute is constitutional. Several commentators have weighed in on this debate, but only a few courts have dealt with the question of the RLUIPA's constitutionality head-on. Part III will address the broader question of

* Note Editor, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW, 2003–04.

[1] 42 U.S.C. §§ 2000cc to cc-5 (2000).

whether or not the statute is helpful to the goal of religious liberty, useful to the development of free exercise doctrine, and effective in its resolution of land use disputes. Finally, Part IV will consider how legislation that regulates religious freedom in the land use context influences the larger debates about the proper development of free exercise rights and the necessity of such legislation in the land use context.

I. Legislative History and Context

On September 22, 2000, President Clinton signed into law the Religious Land Use and Institutionalized Persons Act,[2] following over three years of congressional hearings[3] and intense efforts by interest groups as diverse as the American Civil Liberties Union and the Christian Legal Society.[4] The RLUIPA is Congress's second attempt[5] to undo the Supreme Court's decision in *Employment Division, Department of Human Resources v. Smith*,[6] in which the Court held that neutral laws of general applicability, although they may burden religious exercise, should be evaluated using rational basis review[7]—the least stringent of the Court's three levels of constitutional scrutiny.[8] Congress's first at-

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[2] *Id.*

[3] 146 Cong. Rec. S7774 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy).

[4] 146 Cong. Rec. S7777 (daily ed. July 27, 2000) (letter from the Coalition for the Free Exercise of Religion).

[5] *See* Caroline R. Adams, Note, *The Constitutional Validity of the Religious Land Use and Institutionalized Persons Act of 2000: Will RLUIPA's Strict Scrutiny Survive the Supreme Court's Strict Scrutiny?*, 52 Fordham L. Rev. 2361, 2364 (2002). In the time between the Supreme Court's decision in *City of Boerne v. Flores*, 521 U.S. 507 (1997), and the RLUIPA's passage, Congress had drafted two bills—the Religious Liberty Protection Acts of 1998 and 1999; neither of these laws were enacted. *Id.* The prior bills were more expansive, but failed to pass because of concerns about the proposed legislation's impact on existing civil rights statutes. *See* 146 Cong. Rec. E1563 (daily ed. Sept. 22, 2000) (statement of Rep. Canady); 146 Cong. Rec. S7777 (daily ed. July 27, 2000) (letter from the Leadership Conference on Civil Rights).

[6] 494 U.S. 872(1990).

[7] *Smith*, 494 U.S. at 885.

[8] The Supreme Court has developed three tiers of review for evaluating laws that may have the effect of infringing on an individual's constitutional rights. Under rational basis review, the least stringent level of scrutiny, a law will be upheld if it is rationally related to a legitimate government purpose. Under intermediate scrutiny, the Court will uphold the law so long as it is substantially related to an important government purpose, and the means to achieve that purpose has a substantial relationship to the ends being sought. Finally, under strict scrutiny, the Court will uphold the challenged law only if the government can prove that the law is necessary to achieve a compelling state interest and that the government cannot achieve this purpose through any less restrictive means. *See* Erwin

tempt to undo *Smith* was in 1993, with the Religious Freedom Restoration Act (RFRA),[9] a law that was significantly undermined four years after its passage by the Court's decision in *City of Boerne v. Flores*.[10]

To understand the impetus for the RLUIPA's passage, and Congress's decision to create religious liberty legislation specific to land use, it is important to have a sense of the constitutional landscape in the years preceding that event, particularly the intersection of the Supreme Court's free exercise jurisprudence with its federalism jurisprudence. This section will provide an analysis of the two cases that stand as bookends at either end of the Supreme Court's first thirty years of free exercise case law: *Sherbert v. Verner* and *Employment Division, Department of Human Resources v. Smith*. A clear understanding of free exercise law as defined by the Court is important to unlocking the second element of this section—the struggle between Congress and the Supreme Court to define, with some finality, the extent of religious free exercise under the First Amendment.[11] Thus, this section will also examine the Court's handling of the RLUIPA's predecessor, the RFRA, in *City of Boerne v. Flores*.

A. Sherbert *and* Smith*: A Supreme Court Free Exercise Doctrine in Tension*

The RLUIPA requires that, in cases where government substantially burdens religious exercise, the government actor must show that imposing such a burden on the religious actor, institution, or organization serves a compelling government interest and uses the least restrictive means to achieve that interest.[12] The RLUIPA applies to state and local decisions regarding land use policies that may, incidentally

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CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES §§ 9.2–9.4 (1997). Before *Smith*, the Court had used strict scrutiny to evaluate laws which had the effect of burdening religious exercise. *See id.* § 12.3.2.

[9] 42 U.S.C. § 2000bb (2000).

[10] 521 U.S. 507, 511 (1997); 146 CONG. REC. E1564 (daily ed. Sept. 22, 2000) (statement of Rep. Canady) (explaining that the effect of the Supreme Court's holding in *City of Boerne* was to eliminate all of the statute's references to the states and leave "RFRA applicable only to the federal government"); *see also* Kikumura v. Hurley, 242 F.3d 950, 959–60 (10th Cir. 2001) (holding that RFRA is still applicable to the federal government).

[11] "RLUIPA is the most recent in a series of tugs and pulls between Congress and the Supreme Court to define the scope and extent of the Free Exercise Clause." Cottonwood Christian Ctr. v. Cypress Redevelopment Agency, 218 F. Supp. 2d 1203, 1220 (C.D. Cal. 2002).

[12] 146 CONG. REC. S7774 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy).

or overtly, burden religious exercise.[13] The RLUIPA, like the RFRA before it, is an attempt to return to the strict scrutiny standard of review that the Supreme Court set forth and applied to free exercise claims in *Sherbert v. Verner*.[14] *Sherbert* involved a challenge to the application of the South Carolina Unemployment Compensation Act, which provided that individuals who failed, without good cause, to accept work offered to them by the employer or the employment office were not eligible for unemployment benefits.[15] Adell Sherbert, a Seventh Day Adventist, was fired from her job because she refused to work on Saturdays, the Sabbath of her faith.[16] A prohibition against labor on Saturdays is a "basic tenet" of the Seventh Day Adventist creed.[17] Ms. Sherbert failed to find new employment because all of the mills near her home, like her former employer, required employees to work Saturdays.[18]

The *Sherbert* Court applied strict scrutiny to the South Carolina law.[19] The Court indicated that this heightened level of scrutiny was appropriate because the law infringed on one of Ms. Sherbert's fundamental rights.[20] The Court held that the state's asserted interest in avoiding the risk that some people might file fraudulent claims feigning religious exemption was insufficient to meet the requirements of strict scrutiny.[21] Specifically, the Court reasoned that South Carolina's interest was not compelling enough to require Ms. Sherbert to "choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."[22] The Court made clear that its holding did not invalidate the South Carolina law generally, but it prevented the state from applying it in such a manner that it constrained the religious practice of workers who applied for

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[13] *See id.* The RLUIPA, as its name suggests, also applies to laws which regulate individuals in prisons, mental hospitals, and similar state institutions. This note, however, will focus only on those aspects of the RLUIPA which apply to land use.

[14] 374 U.S. 398, 403 (1963); *see* 146 CONG. REC. E1563 (daily ed. Sept. 22, 2000) (statement of Rep. Canady) ("The phrase 'in furtherance of a compelling governmental interest' is taken directly from RFRA, which was enacted in 1993; the phrase was and is intended to codify the traditional compelling interest test.").

[15] 374 U.S. at 400–01.

[16] *Id.* at 399.

[17] *Id.* at 399 n.1.

[18] *Id.* at 399 n.2.

[19] *Id.* at 403.

[20] *See id.* at 403. (citing NAACP v. Button, 371 U.S. 415 (1963)).

[21] *Sherbert*, 374 U.S. at 407.

[22] *Id.* at 404.

unemployment benefits.[23] The effect of the *Sherbert* decision was to require the use of strict scrutiny to evaluate laws that burdened an individual's free exercise of religion, and this was the doctrine the Court applied to such cases for nearly thirty years.[24]

Many critics and scholars felt that the Court's free exercise jurisprudence took a dramatic shift in the 1990 decision, *Employment Division, Department of Human Resources v. Smith*.[25] *Smith* held that a state regulation prohibiting the use of peyote, a hallucinatory drug used in some Native American sacraments, did not violate the First Amendment's Free Exercise Clause.[26] Respondents in *Smith* were fired from their jobs after their employer learned that they had ingested peyote for sacramental purposes as part of their participation in a Native American religious ceremony.[27] Oregon's Employment Division, the agency responsible for disbursement of unemployment benefits, refused to grant the two respondents benefits because they had been dismissed for work-related misconduct.[28] The State argued that because peyote use was illegal under Oregon state law, the respondents had no right to consume peyote, despite their religious motivations.[29] The Court agreed that the legality of peyote use was relevant to the employee's constitutional claim, and that the question before it was whether Oregon's prohibition on peyote—without exception for religious use—was permissible under the First Amendment.[30]

The Court chose not to apply the holding of *Sherbert* and its progeny to the facts in *Smith*, holding that the test developed in *Sherbert* was, at its most narrow, specific to the context of unemployment compensation and, at its most broad, specific to those situations where "individualized governmental assessment of the reasons for the relevant conduct" was at issue.[31] The Court read the holding of the *Sherbert* line of cases narrowly, restricting them to the "proposition that where the State has in place a system of individual exemptions, it

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[23] *Id.* at 410.

[24] *See infra* text accompanying notes 24–35.

[25] *See* 494 U.S. 872, 908 (1990) (Blackmun, J., dissenting) (arguing that the Court's decision "effectuates a wholesale overturning of settled law concerning the Religion Clauses of our Constitution."); *id.* at 891 (O'Connor, J., concurring) ("In my view, today's holding dramatically departs from well-settled First Amendment jurisprudence . . . .").

[26] *Smith*, 494 U.S. at 878–79.

[27] *Id.* at 874.

[28] *Id.*

[29] *Id.* at 875.

[30] *Id.* at 875–76.

[31] *Id.* at 884.

may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[32] Because the question in *Smith* was not whether the Employment Division failed to take the employees' religious beliefs into account when evaluating their dismissal from their jobs and subsequent request for unemployment benefits, but rather, whether Oregon's general ban on peyote use violated the First Amendment, the Court held that the holding in *Sherbert* was not applicable to the facts in *Smith*.[33] Thus, the Court held that strict scrutiny, or the compelling interest test, was not an appropriate tool for evaluating facially neutral, generally applicable laws.[34]

B. *The Religious Freedom Restoration Act and* City of Boerne: *A Fight for the Last Word with Federalism Implications*

Congress's passage of the RFRA was a direct response to the Supreme Court's decision in *Smith*, and the statute's broad language applied to all situations in which an individual or organization argued that the impact of government action, even when the unintended effect of generally applicable laws substantially burdened free exercise of religion.[35] In 1997, the Supreme Court in *City of Boerne v. Flores* declared that the RFRA exceeded Congress's powers under Section Five of the Fourteenth Amendment.[36]

City of Boerne involved a challenge to a local zoning ordinance in Texas that prevented the enlargement of St. Peter's Catholic Church, a mission style building in the city's historic district.[37] The Archbishop of San Antonio challenged the city's actions under the RFRA, and the city responded by arguing that the statute was unconstitutional because it exceeded the scope of Congress's Fourteenth Amendment enforcement power.[38] Although the facts in *City of Boerne* involved a First Amendment challenge, the case is best understood in the context of the Court's federalism jurisprudence because the bulk of the Court's analysis focused not on the Church's free exercise claim, but on the scope of congressional power under the Constitution.[39] *City of*

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[32] *Smith*, 494 U.S. at 884 (quoting Bowen v. Roy, 476 U.S. 693, 708 (1986)).

[33] *See id.* at 883–85.

[34] *See id.* at 884–86.

[35] Adams, *supra* note 5, at 2371; *see also* City of Boerne v. Flores, 521 U.S. 507, 512 (1997).

[36] *City of Boerne*, 521 U.S. at 536.

[37] *Id.* at 511–12.

[38] *Id.* at 512.

[39] *See infra* Part II.B.

Boerne is important to *this* discussion both because of its place in the continuing dialog between the Supreme Court and Congress over the Free Exercise Clause, and because the facts of the case—a challenge to a city zoning ordinance—reflect the kind of situation Congress is seeking to prevent in the RLUIPA by focusing its remedial power on local land use legislation.

In holding that the RFRA's provisions did not apply to the states, the Court made two essential points.[40] First, the Court distinguished between the power of Congress under Section Five of the Fourteenth Amendment to enforce constitutional rights and the power of the judiciary to define what the law is, as articulated in *Marbury v. Madison*.[41] Because the RFRA's stated purpose was to undo the perceived damage of *Smith*, the Court argued that the statute altered the meaning of the Free Exercise Clause as defined by the Supreme Court.[42] In a statement that reveals the protective territoriality of each branch, the Court concluded that, "Congress does not enforce a constitutional right by changing what the right is."[43] Second, the Court reiterated the principle that whenever Congress acts pursuant to its Section Five powers "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[44] Based on the legislative history of the RFRA, the Court found that Congress acted without a significant showing of state action that effectuated religious bigotry.[45] More damning, however, was the Court's determination that the RFRA was wildly out of proportion with any suggested constitutional threat, reaching into every level of government and touching laws of every type.[46] The combined effect of these two flaws—the improper use of Section Five remedial powers and the lack of congruence and proportionality—upset the balance of power between the legislative and the judicial branches.[47] The effect of the Court's holding was to invalidate the RFRA in its application to state and local governments, and thus, to curb Congress's power to increase the scope of protection for religious expression.

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[40] *See City of Boerne*, 521 U.S. at 519–20.

[41] *Id.* at 516–19 (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)).

[42] *See id.* at 512, 519.

[43] *Id.* at 519.

[44] *Id.* at 520.

[45] *Id.* at 531–32.

[46] *City of Boerne*, 521 U.S. at 532–35.

[47] *Id.* at 536.

The RLUIPA is a concerted effort on the part of Congress to protect religious expression in areas where it is perceived to be regularly threatened while, at the same time, avoiding the pitfalls of the Court's free exercise and federalism jurisprudence.[48] The language of the statute carefully tracks the language of the Supreme Court in both *Smith* and *City of Boerne*. Critics, however, still disagree as to whether or not the RLUIPA passes constitutional muster.

II. Is the Act Constitutional?

The RLUIPA's drafters assert three bases for Congress's authority to enact the legislation: the Spending Clause, the Commerce Clause, and Section Five of the Fourteenth Amendment.[49] As of this writing, only a handful of courts have had an opportunity to hear RLUIPA challenges, and even fewer have ruled directly on the constitutionality of the statute in a land use context.[50] This section will examine the three bases upon which Congress asserted its authority to enact the RLUIPA in light of recent court decisions, the Supreme Court's *Smith* and *City of Boerne* decisions, and scholarly commentary.

A. *Congressional Authority Under the Spending Clause*

Section (a)(2)(A) of the RLUIPA states that the statute applies to any situation in which a "substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden

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[48] *See* Cottonwood Christian Ctr. v. Cypress Redevelopment Agency, 218 F. Supp. 2d 1203, 1221 n.7 (C.D. Cal. 2002) ("Because RLUIPA is based on the Spending and Commerce Clauses, and the codification of current precedent on individualized assessments . . . RLUIPA would appear to have avoided the flaws of its predecessor RFRA, and be within Congress's constitutional authority.") *Cf.* United States v. Maui, 298 F. Supp. 2d 1010, 1015 (D. Haw. 2003) ("Although RLUIPA does 'intrude' to some extent on local land use decisions, there is nothing about it that violates the principles of federalism [or the Tenth Amendment] . . . if the federal statute is otherwise grounded in the Constitution. RLUIPA is not federal zoning of county land; it is federal enforcement of federal rights.").

[49] 146 Cong. Rec. S7775 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy); 146 Cong. Rec. E1563 (daily ed. Sept. 22, 2000) (statement of Rep. Canady).

[50] *See, e.g.*, Freedom Baptist Church of Del. County v. Township of Middletown, 204 F. Supp. 2d 857, 874–76 (E.D. Pa. 2002) (holding that RLUIPA did not offend the Constitution or the federal structure, but recognizing the issue as one in "which there is substantial ground for difference of opinion" and certifying a question about the law's constitutionality to the U.S. Court of Appeals for the Third Circuit). *Cf.* Elsinore Christian Ctr. v. City of Lake Elsinore, 291 F. Supp. 2d 1083, 1103 (C.D. Cal. 2003) (holding that because RLUIPA "was enacted without the ambit of congressional authority, it is unconstitutional").

results from a rule of general applicability."[51] This section mirrors the language of other civil rights statutes.[52] The Spending Clause provisions of the RLUIPA are patterned after similar provisions in other federal civil rights laws, such as Title VI of the Civil Rights Act of 1964, and is in concert with existing Supreme Court case law allowing Congress to attach conditions on federal spending, so long as those conditions are germane to the federally-funded program.[53] As is to be expected, RLUIPA cases thus far have involved challenges to state and local land use regulations, and courts have not found it necessary to evaluate the statute in light of Congress's Spending Clause authority.[54] It is unlikely that this section will be relevant to the majority of challenges involving land use regulations that are brought under the RLUIPA because most land use regulation is local and is not funded through grants from the federal government.

B. *Congressional Authority Under the Commerce Clause*

More controversial than the RLUIPA's section addressing its origin in the Spending Clause is section (a)(2)(B), which places the statute within the scope of Congress's authority under the Commerce Clause.[55] This section extends the RLUIPA's scope over any case where "the substantial burden [on religious exercise] affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability."[56] This section is referred to as the "jurisdictional element" of the statute; it must be satisfied in cases asserting a RLUIPA challenge to a law of general applicability.[57] Conscious of the Supreme Court's recent rulings in Commerce Clause cases,[58] proponents of the RLUIPA were careful to address how religious exercise fits

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[51] 42 U.S.C. § 2000cc(a)(2)(A) (2000).

[52] 146 CONG. REC. S7775 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy) (citing Title VI of the Civil Rights Act of 1964 and South Dakota v. Dole, 483 U.S. 203 (1987), for the proposition that Congress is permitted to "attach germane conditions to federal spending").

[53] 146 CONG. REC. S7775 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy).

[54] *See, e.g., Freedom Baptist Church*, 204 F. Supp. 2d at 865 n.10.

[55] *See* 42 U.S.C. § 2000cc(a)(2)(B).

[56] *Id.*

[57] 146 CONG. REC. E1563 (daily ed. Sept. 22, 2000) (statement of Rep. Canady).

[58] *See* United States v. Morrison, 529 U.S. 598, 610 (2000); United States v. Lopez, 514 U.S. 549, 551 (1995) (together standing for the proposition that Congress cannot use its power under the Commerce Clause to regulate non-commercial activities, no matter how much those activities may affect interstate commerce).

within the scope of Congress's power to regulate interstate commerce.[59] As Representative Canady, co-sponsor of the House version of the bill, explained, "[t]his subsection does not treat religious exercise itself as commerce, but it recognizes that the exercise of religion sometimes requires commercial transactions, as in the construction, purchase, or rental of buildings."[60]

A handful of courts have addressed the issue of the RLUIPA's viability under the Commerce Clause. For example, *Freedom Baptist Church v. Township of Middletown*, involved a challenge to town zoning ordinances which prevented the church from renting worship space in a commercial district.[61] When the church applied to Middletown's Zoning Hearing Board for a variance, its application was denied.[62] After litigation began, the Court of Common Pleas for the county granted the variance, subject to conditions related to time of use and overflow parking provisions.[63] The church brought suit against the township, alleging that the zoning scheme, which did not permit religious worship in any of its seventeen districts without subjecting that use to what it described as "onerous requirements,"[64] violated the RLUIPA because the township's zoning laws had the effect of burdening the plaintiff's religious expression.[65]

As part of its defense, the Township argued that the RLUIPA was unconstitutional because Congress exceeded its Commerce Clause authority when it adopted the statute.[66] Middletown argued that Congress could not invoke its Commerce Clause authority to regulate religious exercise which it characterized as the "antithesis of commerce."[67] The plaintiffs countered, however, that the "rental of property and use and development of land substantially affect interstate commerce," and thus the zoning condition on the church's ability to lease worship space

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[59] *See* 146 CONG. REC. E1563 (daily ed. Sept. 22, 2000) (statement of Rep. Canady).

[60] *Id.*

[61] Freedom Baptist Church v. Township of Middletown, 204 F. Supp. 2d 857, 859, 865–66 (2002).

[62] *Id.* at 859.

[63] *Id.*

[64] In order to obtain a conditional use permit for religious worship, the town required applicants to provide adequate parking and a minimum lot size of 5 acres, a requirement that the Church argued made it nearly impossible for any new churches to locate within the Township. *See id.*

[65] *Id.*

[66] *Id.* at 865.

[67] *Freedom Baptist Church*, 204 F. Supp. 2d at 866. *But see supra* text accompanying note 59.

constituted a significant burden on the plaintiff's religious exercise, thereby triggering the RLUIPA's Commerce Clause provision.[68]

The court agreed with the plaintiffs, holding that "insofar as state or local authorities 'substantially burden' the economic activity of religious organizations, Congress has ample authority to act under the commerce clause."[69] The court distinguished the RLUIPA from the statutes the Supreme Court had held violated the Commerce Clause in *United States v. Morrison*[70] and *United States v. Lopez*,[71] because in those cases Congress sought to regulate criminal activity.[72] The court further reasoned that, despite the fact that zoning and land use regulations are traditionally local matters, Congress retained its broad authority to regulate the aggregate effects of intrastate commerce on the nation under the standard set forth in *Wickard v. Filburn*,[73] the essential holding of which survived the Supreme Court's analysis in *Morrison*.[74]

There is scholarly disagreement about whether or not the RLUIPA satisfies the requirements of judicial analysis under the Commerce Clause, and much of the debate turns on how broadly one defines free exercise.[75] For those whose concept of free exercise includes obtaining a space to worship, the RLUIPA's Commerce Clause-based jurisdictional element would easily be satisfied.[76] Storzer and Picarello suggest

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[68] *Id.*

[69] *Id.* at 867–68 (internal citations omitted).

[70] 529 U.S. 598 (2000) (determining the constitutionality of the Violence Against Women Act).

[71] 514 U.S. 549 (1995) (determining the constitutionality of the Guns Free School Zone Act).

[72] *Freedom Baptist Church*, 204 F. Supp. 2d at 866–67 (stating that the criminal nature of conduct was central to the Court's determination in *Morrison*).

[73] 317 U.S. 111 (1942) (holding that the Court could consider the effect of discrete commercial activities in the aggregate on interstate commerce). *See also* Westchester Day Sch. v. Vill. of Mamaroneck, 280 F. Supp. 2d 230, 238 (S.D.N.Y. 2003) (holding that the RLUIPA does not violate the commerce clause, in part, because religious organizations "facilitate the interchange of ideas, goods and services across a religious community that may span multiple states, as well as between that community and the outside world. This is paradigmatic 'commerce.'") (quoting U.S. v. Ballinger, 312 F.3d 1264, 1283 (11th Cir. 2002).

[74] 204 F. Supp. 2d at 867 nn.12 & 14 (discussing the Supreme Court's *Morrison* holding).

[75] *Compare* Roman P. Storzer & Anthony R. Picarello, Jr., *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices*, 9 GEO. MASON L. REV. 929, 952–53 (2001) (finding that the RLUIPA falls within Congress's Commerce Clause power), *with* Evan M. Shapiro, Note, *The Religious Land Use and Institutionalized Persons Act: An Analysis Under the Commerce Clause*, 76 WASH. L. REV. 1255, 1278 (2001) (finding that the RLUIPA is an unconstitutional use of Congress's Commerce Clause power).

[76] *See* Storzer & Picarello, *supra* note 74, at 953.

that permitting denials, like the one at issue in *Freedom Baptist Church*, stifle the economic activity surrounding a building project: "employing construction workers, purchasing and transporting building materials and supplies, raising and transferring funds, and entering contracts."[77] In many cases, religious organizations come into contact (and conflict) with land use regulations when they begin a project like constructing a place to meet.[78] The process of this construction is necessarily economic because it involves the purchase of both goods and services.[79] Furthermore, the argument reasonably extends to capture out of state activities as the project of constructing a new building is generally not confined to just the state or community where the religious organization is located, as goods and services are often imported from out of state.[80] Thus, Storzer and Picarello assert that the RLUIPA's validity under the Commerce Clause is easily established.[81]

On the other hand, those who place the RLUIPA in the context of the Supreme Court's recent decisions in *Morrison* and *Lopez*, find that the statute fails to satisfy the command that Congress use its Commerce Clause power solely to regulate activities that are economic in nature and that have a substantial effect on interstate commerce.[82] Rather than focusing on the activities involved in securing a place to worship, Evan M. Shapiro argues that "land use regulation does not constitute an economic enterprise or a commercial transaction."[83] In making such a claim, he relies on the factors set forth by the Supreme Court in *Morrison* and *Lopez*: (1) Congress's own finding that the regulated activity affects interstate commerce; (2) the strength of the nexus between the

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[77] *Id.*

[78] *See id.*

[79] *See id.*; *see also* Cottonwood Christian Ctr. v. Cypress Redevelopment Agency, 218 F. Supp. 2d 1203, 1221–22 (C.D. Cal. 2002) (Explaining that religious congregations participate in commerce both during and after construction of a building project.)

> [T]he use of the church once it is constructed will affect commerce. [The church] will employ ministers, maintenance personnel, and daycare center workers. [The congregation] will use its church to transmit a televised ministry and hold national religious conferences. Furthermore, the bookstore will have employees and will regularly obtain merchandise for resale. All of these activities affect commerce.

Id.

[80] *See* Storzer & Picarello, *supra* note 74, at 953.

[81] *See id.*

[82] *See* Shapiro, *supra* note 75, at 1279; Ada-Marie Walsh, Note, *Religious Land Use and Institutionalized Persons Act of 2000: Unconstitutional and Unnecessary*, 10 WM. & MARY BILL RTS. J. 189, 201 (2001).

[83] Shapiro, *supra* note 75, at 1278.

regulated activity and interstate commerce; and (3) the absence of a jurisdictional element in the statute itself.[84] Shapiro also argues that, although the congressional record was replete with evidence of the involvement of religious organizations in zoning disputes, these findings do not automatically point to the economic impact of such land use regulation.[85] He claims that the RLUIPA requires a court to make too many inferences in connecting land use regulation as applied to religious exercise and interstate commerce.[86] Finally, he argues that the RLUIPA's jurisdictional element is ineffective because it leaves plaintiffs little choice but to use vague, speculative data to prove that the land use regulation in question, as applied to their religious expression, has a negative effect on interstate commerce.[87]

C. *Congressional Authority Under Section Five of the Fourteenth Amendment*

The third potential source of Congress's authority to enact the RLUIPA is the power granted to it under Section Five of the Fourteenth Amendment to enforce the laws of the United States; in this case, the First Amendment.[88] Section (a)(2)(C) of the Act provides that the RLUIPA applies to any case in which a "substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, *individualized assessments* of the proposed uses for the property involved."[89] The bill's drafters asserted that the RLUIPA enforces the First Amendment, and particularly the Free Exercise Clause, as it has been interpreted by the Supreme Court.[90] The ability

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[84] *Id.* at 1282–83; *see also* Walsh, *supra* note 82, at 208.

[85] Shapiro, *supra* note 75, at 1283.

[86] *Id.* at 1285.

[87] *Id.* at 1287.

[88] 146 CONG. REC. E1563 (daily ed. Sept. 22, 2000) (statement of Rep. Canady); 146 CONG. REC. S7775 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy).

[89] 42 U.S.C. § 2000cc(a)(2)(C) (2000) (emphasis added). A prima facie case under the statute requires a plaintiff to show that the land use regulation at issue: "1) imposes a substantial burden; 2) on the 'religious exercise;' 3) of a person, institution, or assembly." Grace United Methodist Church v. City of Cheyenne, 235 F. Supp. 2d 1186, 1194 (D. Wyo. 2002). At that point, the defendant municipality or state has the burden of proving that the regulation: 1) furthers a compelling governmental interest; 2) by the least restrictive means. *Id.*

[90] 146 CONG. REC. S7775 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy) (citing Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) and Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 884 (1990)

of Congress to ground its authority in Section Five is most relevant to this portion of the RLUIPA concerning individualized assessments, for it was, in part, through these two words that the Supreme Court distinguished the holding in *Sherbert* from the facts of *Smith*.[91]

The RLUIPA's language and structure also reflect Congress's sensitivity to the Court's holding in *City of Boerne*.[92] By limiting the RLUIPA substantively, to those regulations that govern land use and institutionalized persons and that affect religious exercise, and procedurally, to only those laws that allow the government to make an individualized assessment, Congress has attempted to construct a statute that is both congruent and proportional and that will survive the Supreme Court's careful scrutiny.[93]

The court in *Freedom Baptist Church* addressed this concern directly.[94] There, the court examined the RLUIPA's relationship to Congress's Section Five powers by addressing two related issues.[95] First, the court considered whether the RLUIPA truly was a codification of the Supreme Court's free exercise jurisprudence—in other words, does the RLUIPA square with the Court's decision in *Smith*?[96] Second, the *Freedom Baptist Church* court addressed the issue of congruence and proportionality; that is to say, does the RLUIPA avoid the infirmities which sunk the RFRA in *City of Boerne*?[97]

The court first determined that the *Sherbert* standard for applying strict scrutiny in free exercise cases that challenged laws imposing individualized assessments survived the Supreme Court's decision in *Smith*.[98] This finding was based on the Supreme Court's own language in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[99] where it explained *Smith* as standing for the proposition that where government allows for individual exemptions from general laws, it may not refuse to provide such exemptions to persons who articulate a religiously

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for the proposition that, "[w]here government makes such individualized assessments, permitting some uses and excluding others, it cannot exclude religious uses without compelling justification").

[91] *See id*; *see also Smith*, 494 U.S. at 884–85.

[92] *See* 146 CONG. REC. S7775 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy).

[93] *See id.*

[94] Freedom Baptist Church v. Township of Middletown, 204 F. Supp. 2d 857, 868–69 (E.D. Pa. 2002).

[95] *Id.* at 868–74.

[96] *Id.* at 868–71.

[97] *Id.* at 872–74.

[98] *Id.* at 868.

[99] 508 U.S. 520 (1993).

motivated reason for requesting an exemption.[100] Thus, Congress's enactment of subsection (a)(2)(C) of the RLUIPA did nothing more than codify existing Supreme Court jurisprudence.[101]

Second, the *Freedom Baptist Church* court found that, through the RLUIPA, Congress had not blurred the line between creating a remedy to unconstitutional laws and defining constitutional rights.[102] By targeting only "low visibility decisions with the obvious—and, for Congress, unacceptable—concomitant risk of idiosyncratic application," the RLUIPA conforms with the Supreme Court's decision in *City of Boerne*, satisfying both the requirements for congruence and proportionality.[103] Thus, the *Freedom Baptist Church* court concluded that the "RLUIPA's land use provisions [were] constitutional on their face as applied to states and municipalities."[104]

Determining whether or not Congress exceeded its Section Five power in passing the RLUIPA depends, necessarily, upon one's interpretation of the Supreme Court's holding in *Smith*. For example, Professor Ira C. Lupu, has suggested that zoning schemes, because they are "characterized by a high degree of discretion" do not fit within the primary holding of *Smith* at all, instead falling within *Smith's* own exception for systems of individualized assessment. One court recently agreed with Professor Lupu's assessment.[105] In *Castle Hills First Baptist Church v. City of Castle Hills*,[106] a court upheld RLUIPA's constitutionality as a valid exercise of Congress's Section Five power.[107] "Zoning, and the

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[100] *Freedom Baptist Church*, 204 F. Supp. 2d at 869 (citing, with approval, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993)).

[101] *Id.*

[102] *See id.* at 872.

[103] *Id.* at 873–74.

[104] *Id.* at 874.

[105] Ira C. Lupu, The Case Against Legislative Codification of Religious Liberty, 21 CARDOZO L. REV. 565, 573 (1992).

[106] 2004 WL 546792, *7 (W.D. Tex. Mar. 17, 2004).

[107] *Id.* In this recent case, a local church claimed that the city's denial of two special use permits—one to build a parking lot and one to alter the use of a top story church building—violated its rights under the First Amendment, the RLUIPA, and the Texas Religious Freedom Restoration Act. *Id.* at 2. But see *Elsinore Christian Ctr. v. City of Lake Elsinore*, 291 F. Supp. 2d 1083, 1098 (C.D. Cal. 2003), where the court states that:

> Land use permitting is not an analogous case. In determining whether to issue a zoning permit, municipal authorities do not decide whether to exempt a proposed user from an applicable law, but rather whether the general law applies to the facts before it. In this case, for instance, no users are "exempt" from the C-1 zoning rules. Rather, certain commercial users may locate in C-1 zones as a matter of right, while non-commercial users, including churches,

special use permit application process specifically, inherently depend upon a system of individualized assessment. Moreover, courts have already recognized that land use regulations that require individualized assessment fall within the scope of the remaining strict scrutiny treatment left in the wake of Smith and Hialeah."[108] The *Castle Hills* court's analysis underscores the importance of the statutory language regarding individualized assessments to RLUIPA's constitutionality.[109]

On the other hand, at least one federal court has held that the RLUIPA is unconstitutional because it exceeds the scope of congressional authority under Section Five.[110] In *Elsinore Christian Center v. City of Lake Elsinore*, the plaintiffs, the church, and one of its members, brought suit against the city alleging a violation of the RLUIPA for the city's failure to grant the church a conditional use permit to operate a church in a commercially zoned, blighted area of the city.[111] The *Elsinore* court first evaluated the church's claim under the statute and found that, because of the Act's definitional language, the city's failure to demonstrate that its decision was "in furtherance" of a compelling interest, and the city's failure to use the least restrictive means to advance its interest, its denial of a conditional use permit violated the RLUIPA.[112] In part, because of its statutory analysis, the *Elsinore* court found that the RLUIPA was unconstitutional.[113] "It is the Act's explicit redefinition of 'religious exercise' that effects a manifest change in the analysis. Because use of land is 'religious exercise' under RLUIPA, there can be no doubt that the City's action denying use of the Subject Property is a 'substantial burden' of that use."[114]

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must seek a permit. Thus, the Church is simply subject to the same permitting rules as all other users.

Id.

[108] *Castle Hills First Baptist Church*, 2004 WL 546792 at *15.

[109] *See id.*

[110] *Elsinore*, 291 F. Supp. 2d at 1103.

[111] *Id.* at 1085–86.

[112] *Id.* at 1091, 1094–95. The City offered several justifications for denying the church a permit: maintaining a needed service (the space's current tenant was a discount grocery store in a low-income neighborhood); preventing loss of property tax revenue; potential paucity of adequate on-site parking for the church's congregation; and curbing urban blight by continuing to support a grocery store and provide local jobs. *Id.* at 1093. The court determined that maintenance of tax revenue was not a compelling interest. *Id.* "The maintenance of property tax revenue is a potentially pretextual basis for decision-making that appears to have been a specific target of RLUIPA." *Id.*

[113] *See id.* at 1091.

[114] *Id.*

In ruling that the RLUIPA exceeds congressional power under Section Five, the *Elsinore* court found that Congress misinterpreted the Supreme Court's free exercise jurisprudence since the *Smith* ruling.[115] "Rather than codifying precedent, RLUIPA mandates a sea change in the relevant standard of review."[116] Unlike the RLUIPA, the *Elsinore* court explained, existing Supreme Court doctrine does not equate "a burden on a religious assembly's use of land . . .[with] a 'substantial burden' on central religious practice under the Free Exercise Clause."[117] Because the denial of a permit, under traditional Supreme Court analysis, does not amount to a substantial burden on religious exercise, the rule of Sherbert does not apply to ordinary land use regulation, the court held.[118] This distinction, the *Elsinore* court determined, was fatal to the constitutionality of the statute: "[b]ecause the Church's denial of the [conditional use permit] is not subject to strict scrutiny under Sherbert and its progeny, RLUIPA cannot be said to effect a simple 'codification' of existing constitutional law."[119]

Additionally, some commentators argue that Congress exceeded its Section Five power in enacting the RLUIPA.[120] For instance, Caroline Adams argues that the RLUIPA significantly expands the scope of the Supreme Court's *Smith* holding and will effectively increase the number and variety of land use cases where courts will enforce a compelling interest test.[121] The RLUIPA, she contends, forces zoning boards to make an assessment of the proposed uses for the property and to apply greater deference where that use is related to religious exercise.[122] The proper understanding of *Smith*, she argues, is that government should only apply the kind of deference mandated in *Sherbert* when government's assessment of an individual claim involves an inquiry into the reasons for the relevant conduct.[123] Thus, the RLUIPA expands the scope of free exercise jurisprudence by requiring this type of individualized inquiry in situations where the appli-

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[115] *See id.* 1099.

[116] *Elsinore*, 291 F. Supp. 2d at 1099.

[117] *Id.* at 1098.

[118] *See id.*

[119] *Id.* at 1099.

[120] Adams, *supra* note 5, at 2392.

[121] *Id.* at 2404, 2405; *see also* Walsh, *supra* note 82, at 197–99.

[122] Adams, *supra* note 5, at 2404. At least one court agrees: "RLUIPA's test places a virtually insuperable barrier before states and municipalities attempting to justify actions that, far more often than not, are neither motivated by religious bigotry nor burdensome on central religious practice." *Elsinore*, 291 F. Supp. 2d at 1101.

[123] *Id.*

cants' motivations for requesting an exemption are not important to the decisionmaker's evaluation.

Adams also argues that the RLUIPA fails the Supreme Court's command in *City of Boerne* that Congress's actions pursuant to Section Five be both congruent and proportional to the harm which the legislation seeks to remedy.[124] After a thorough review of the congressional record, she argues that Congress lacked sufficient evidence of a pattern and practice of religious discrimination to justify the enactment of the RLUIPA.[125] She argues that Congress relied on evidence made up, in large part, of flawed statistics and anecdotal evidence of religious discrimination.[126] For example, Congress relied heavily on an outdated Brigham Young University study which found that minority religions were over-represented in zoning and land use disputes.[127]

D. *A Record of Avoidance: How Have Lower Courts Handled the Question of the RLUIPA's Constitutionality?*

Only a handful of courts have had an opportunity to hear cases involving the land use aspect of the RLUIPA and to comment on the Act's constitutionality.[128] In *Hale O Kaula Church v. Maui Planning Commission*, a church alleged that the planning commission violated the RLUIPA and the First Amendment when the commission denied the church a special use permit to construct a building for religious worship on a parcel zoned for agriculture under the state of Hawaii's land

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[124] *Id.* at 2392.

[125] *Id.* at 2393.

[126] *Id.*

[127] *Id.* at 2397–400. Adams found that this study was outdated and that the study's methods failed to take into account the concentration of religious groups in a given geographical area in determining which religions were in the minority. *See id.*; *see also Elsinore*, 291 F. Supp. 2d at 1100 ("In fact, the [congressional] hearing record consists of a relatively small number of anecdotal instances in which religious assemblies were dissatisfied with zoning decisions or regulations, few of which constitute state or municipal actions of a clearly unconstitutional character.").

[128] *See, e.g.*, Castle Hills First Baptist Church v. City of Castle Hills, 2004 WL 546792 (W.D. Tex. Mar. 17, 2004); *Elsinore*, 291 F. Supp. 2d at 1083 (C.D. Cal. 2003); Hale O Kaula Church v. Maui Planning Comm'n, 229 F. Supp. 2d 1056 (D. Haw. 2002); Murphy v. Zoning Comm'n, 148 F. Supp. 2d 173 (D. Conn. 2001); *see also* Konikov v. Orange County, Florida, 302 F. Supp. 2d 1328, 1346 (M.D. Fla. 2004) ("In light of the Court's conclusion that no RLUIPA violation has been established, the Court need not reach the question of RLUIPA's constitutionality."); Corp. of the Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. City of W. Linn, 86 P.3d 1140 (Or. App. 2004) (ruling that a city's denial of a conditional use permit to build a church meetinghouse in a residential area did not violate the RLUIPA and remanding the case to the local Land Use Board of Appeals without reaching the question of the RLUIPA's constitutionality.)

use classification system.[129] Plaintiffs asserted a facial challenge—that the RLUIPA invalidated the provisions of Hawaii's state land use laws as enforced through the local planning board—as well as a claim that the board's application of the zoning law violated the RLUIPA.[130] The planning commission defended that the RLUIPA was constitutionally invalid.[131] Without addressing the issue of the RLUIPA's constitutionality, the court rejected both the plaintiffs' facial and as applied challenges.[132]

First, rejecting the facial claim, the court held that the state's land use classification scheme did not violate the RLUIPA because the Hawaii law's placement of land into agricultural, rural, urban, and conservation districts did not discriminate against religious buildings or uses.[133] Although the court conceded that Hawaii's facially neutral law of general applicability did include a system of individualized assessments, the court reasoned that, because plaintiffs were treated on equal terms with other non-religious, non-agricultural land owners under the law, the statute did not violate the RLUIPA.[134]

Second, the court held that the question of the RLUIPA's constitutionality was mooted by the fact that existing Supreme Court doctrine required the court to use strict scrutiny to evaluate the planning commission's denial of the church's request for an exemption to the land use classification.[135] Sidestepping the issue of the RLUIPA's constitutionality, the court reasoned that the Supreme Court's holding in *Smith*—that "where the State has in place a system of individualized exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason"—required the court to use strict scrutiny, regardless of the demands of the RLUIPA.[136] Sweeping aside the defendant's argument that the RLUIPA violated the Constitution by exceeding the scope of Congress's Commerce Clause power as defined in *Lopez*, the court determined that both the RLUIPA's inclusion of a jurisdictional element as well as the Act's regulation of a narrow field of activity made the RLUIPA impervious to the defendant's argument.[137]

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[129] *Hale O Kaula Church*, 229 F. Supp. 2d at 1059–60.

[130] *See id.* at 1069–70.

[131] *Id.* at 1064.

[132] *See id.* at 1070, 1074.

[133] *Id.* at 1070.

[134] *Id.* at 1070–71.

[135] *Hale O Kaula Church*, 229 F. Supp. 2d at 1072–73.

[136] *Id.* at 1073.

[137] *Id.* at 1071–72. The court did seem to suggest, however, that it might have ruled differently if the defendants had argued that the RLUIPA violated the Constitution because it

The *Hale O Kaula* court failed to reach the ultimate question of whether or not the planning commission's actions violated the church's religious exercise rights because the record lacked sufficient detail to address this issue.[138] A year later, however, the same judge, in a parallel case, upheld the constitutionality of the RLUIPA.[139] At this point, the federal government had already intervened in *Hale O Kaula Church* to defend the statute.[140] Although the court indicated that there was new caselaw on point, it concluded that none of this precedent was "truly binding."[141] Upholding the RLUIPA, the *Maui* court found: "[e]ven if Congress went a little further in codifying an extension of the 'individualized assessments' doctrine from an unemployment benefits context . . . to a land use context, it acted with 'congruence and proportionality' in codifying strict scrutiny in this context."[142]

Another federal court in Illinois similarly dodged the question of the RLUIPA's constitutionality.[143] In *C.L.U.B. v. City of Chicago*, several religious groups who had experienced difficulty obtaining worship spaces in the city challenged Chicago's zoning ordinances as violative of the RLUIPA.[144] During the course of the litigation, the city had amended its zoning ordinances—which had not previously allowed for religious uses by right in any of its land use districts—and had thus, according to the court, removed any substantial burden on religious exercise and undermined the applicability of the RLUIPA.[145] Because the court held that the RLUIPA no longer applied to the facts in the case, it did not find it necessary to address the question of the Act's constitutional validity.[146]

In a third case, *Murphy v. Zoning Commission*, plaintiffs alleged that the town's zoning commission violated their First Amendment rights

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failed to conform to the Supreme Court's congruence and proportionality requirements for evaluating Commerce Clause challenges. *See id.* at 1073. In dicta, the court noted that even though it applied strict scrutiny in this case, "it [did not] necessarily mean that Congress did not go too far in codifying strict scrutiny for *all* zoning or land use laws, or in codifying an interpretation and *extension* of the 'individualized assessments' doctrine (i.e., extending the doctrine from an unemployment benefits context as in *Smith* to all zoning contexts)." *Id.*

[138] *Id.* at 1074.

[139] United States v. Maui, 298 F. Supp. 2d 1010, 1016 (D. Haw. 2003).

[140] *Id.*

[141] *Id.* at 1014.

[142] *Id.* at 1016.

[143] *See* C.L.U.B. v. City of Chicago, 157 F. Supp. 2d 903, 917 (N.D. Ill. 2001).

[144] *Id.* at 905, 906.

[145] *Id.* at 905–06, 917.

[146] *Id.* at 917.

and the RLUIPA when it ordered the plaintiffs to suspend weekly prayer meetings held in their home, as the regularly scheduled meetings and subsequent parking overflow violated town zoning ordinances.[147] In its decision granting the plaintiffs' motion for a preliminary injunction, the court declined to address the issue of the RLUIPA's constitutionality.[148] Although the defendants had articulated to the court that they intended to challenge the RLUIPA's constitutional fitness, neither party had briefed the issue at the time of the hearing.[149] For the purposes of determining the plaintiff's likelihood of success on the merits—part of the court's analysis about whether or not to grant plaintiffs' motion for a preliminary injunction—the court chose to presume the constitutional validity of the RLUIPA.[150]

At this point, then, most courts have ruled that the RLUIPA does not violate the Constitution. There is significant scholarship, however, suggesting that if the question of the constitutionality of the RLUIPA ever reached the Supreme Court, it would be held unconstitutional. Nevertheless, until the Supreme Court can find, and decides to accept an appropriate case, the RLUIPA will likely be held constitutional by lower federal courts.

III. Analysis: Even If the RLUIPA Can Pass Constitutional Muster, Is the Statute Beneficial?

To date, most scholarship concerning the RLUIPA has focused primarily on the Act's constitutionality. An equally important question, however, is whether or not the RLUIPA is a useful piece of legislation. This is especially true if the statute's goal is to enhance the free exercise of religion in matters relating to land use. As this section will explain, there is legitimate concern on the part of some commentators that the RLUIPA will have the opposite of its intended effect, and will actually curb the ability of courts to protect free exercise in the land use context, as well as in other arenas.[151]

As one commentator has suggested, and as at least one court has shown, there is reason to worry that both plaintiffs' attorneys and judges will overlook more creative avenues in the wake of legislation

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[147] 148 F. Supp. 2d 173, 177 (D. Conn. 2001).
[148] *Id.* at 187 n.13.
[149] *Id.*
[150] *Id.*
[151] *See infra* Part III.A.

like the RLUIPA, and freeze the development of free exercise jurisprudence in its tracks.[152]

A careful look at the Supreme Court's treatment of free exercise in the years since *Smith* reveals at least two avenues left open by the Court for protecting religious free exercise: hybrid rights theory and schemes of individualized application.[153] These two alternatives have considerable potential to alleviate some of Congress's concerns regarding the often difficult situations religious communities find themselves in as they attempt to navigate local land use schemes.

A. *The Risk of "Constitutional Atrophy" to Free Exercise Jurisprudence*

At least one commentator has suggested that religious freedom legislation, like the RLUIPA, is undesirable because it may have the unintended consequence of "atrophy" of judicial development in the area of free exercise jurisprudence.[154] Professor Lupu argues that religious liberty legislation like the RLUIPA (and the RFRA before it) will become a "lightning rod" for judicial attention and create the illusion that the Free Exercise Clause is ineffectual in protecting religious freedom and undeserving of judicial examination.[155] If courts expend most of their energy in this area on RLUIPA claims, ignoring traditional free exercise analysis, "the possibilities for new and creative approaches to free exercise adjudication are likely to shrink over time; and some pre-existing categories of free exercise protection . . . may be diminished."[156] At the same time, Professor Lupu suggests that non-comprehensive religious liberty legislation, specifically in the land use context, is less likely to have such an affect on judicial development of constitutional norms for the entire free exercise corpus.[157] His suggestion seems to be that, because this legislation is so focused on a subset of free exercise issues, it will not prevent judges from approaching other free exercise claims creatively.[158] Still, it is unclear whether Professor Lupu is just less concerned about threats to free exercise in the land use context or whether he is willing to sacrifice

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[152] *See infra* Part III.D.

[153] *See infra* Part IV.B.

[154] Lupu, *supra* note 105, at 580.

[155] *See id.*

[156] *Id.* (discussing the effects of the RLUIPA's predecessor, the RFRA).

[157] *See id.* at 581 (discussing a proposed California land use law).

[158] *See id.* at 580.

free exercise cases in the land use context in order to preserve the larger body of free exercise jurisprudence.[159]

B. *After* Smith, *Is There Room for Judicial Creativity?*

After the Supreme Court's 1990 decision in *Employment Division, Department of Human Resources v. Smith*, many scholars and advocates of religious liberty suggested that the *Smith* decision was both a reversal of prior Supreme Court free exercise precedent and a danger to the future of religious liberty.[160] Three years after *Smith*, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Supreme Court sharpened its free exercise jurisprudence while reaffirming *Smith*'s essential holding.[161] What is interesting about the case, however, is its treatment of *Smith*'s mandate that neutral laws of general applicability receive only rational basis, rather than strict scrutiny review.[162]

Lukumi involved several Florida city ordinances that prohibited religious animal sacrifice within the city limits and made the practice punishable by both fines and imprisonment.[163] The legislation, which included exemptions for the commercial slaughter of animals raised for human consumption,[164] was passed in response to the anticipated establishment of a Santeria[165] community and church in the city.[166] Among the rituals practiced by Santeria believers is the sacrifice of chickens, pigeons, doves, ducks, guinea pigs, goats, sheep, and turtles.[167] In most instances, these animals are eaten after the ritual is performed.[168] Upon enactment of the city's new ordinances, the Church filed an action alleging violations of its rights under the Free Exercise Clause of the First Amendment and sought a declaratory judgment as well as injunctive and monetary relief.[169]

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[159] *See id.* at 581.

[160] *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 577–78 (1993) (Blackmun, J. concurring).

[161] *Id.* at 531–32, 545.

[162] *See id.* at 524.

[163] *Id.* at 527, 528.

[164] *Id.*

[165] The Santeria religion is a fusion of western African religious practice with Roman Catholicism, developed in Cuba during the Nineteenth century when African slaves were brought to the island. *Id.* at 524.

[166] *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 526–27.

[167] *Id.* at 525.

[168] *Id.*

[169] *Id.* at 528.

Before analyzing the ordinance at issue in the case, the *Lukumi* Court made the threshold determination that the record sufficiently demonstrated that animal sacrifice was an integral element of Santeria religious belief and merited First Amendment protection.[170] The Court then described the level of scrutiny that it would apply to the law; it began by restating the holding of *Smith*, that neutral laws of general applicability are not subject to analysis under strict scrutiny, even when the effect is to burden religious expression.[171] If a law cannot meet these two requirements—neutrality and general applicability—the Court further explained that it must be analyzed under strict scrutiny.[172]

The *Lukumi* Court found that the law failed to meet these requirements.[173] Relying on *Smith*, the Court held that when "the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral."[174] In determining the object of the city's ordinances, the Court examined three relevant factors: the text of the ordinance,[175] the adverse impact of the ordinance,[176] and the historical background of the law's passage.[177]

In terms of the text, the *Lukumi* Court stressed that facial neutrality of the statute is not, by itself, determinative of neutrality for the purposes of free exercise analysis.[178] The language of the city's statutes, the Court found, suggested that the ordinances' true object was to target Santeria practice.[179] One of the ordinances in question began with the statement that "citizens of the City of Hialeah have expressed their concern that certain religions may propose to engage in practices which are inconsistent with public morals, peace or safety."[180] The Court, however, did not end its analysis of the neutrality element there.[181]

The *Lukumi* Court next examined the adverse impact of the city's ordinances, holding that, although adverse impact alone is not sufficient to prove a law's object, the "effect of a law in its real opera-

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[170] *Id.* at 531.
[171] *Id.*
[172] *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 531–32.
[173] *Id.* at 542.
[174] *Id.* at 533.
[175] *Id.* at 533–34.
[176] *Id.* at 535.
[177] *Id.* at 540.
[178] *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 533–34.
[179] *Id.* at 534–35.
[180] *Id.* at 535.
[181] *See id.*

tion is strong evidence of its object."[182] The Court went on to find that the City of Hialeah's ordinances prohibiting ritual sacrifice of animals amounted to "religious gerrymandering."[183] Because the ordinances incorporated a number of exemptions within their language—for example, exemptions for kosher slaughter, hunting, and slaughter by licensed food establishments—the Court found it nearly impossible to draw any conclusion other than an object to target Santeria religious practice.[184]

Finally, the Court also examined the circumstances surrounding the passage of the city's several ordinances.[185] Borrowing analysis from the decision in *Arlington Heights v. Metropolitan Housing Development Corp.*,[186] the *Lukumi* Court held that a law's historical background is significant to the determination of the law's object.[187] Among the factors relevant to this part of the Court's analysis are the "specific series of events leading to the enactment [of the] official policy in question, and the legislative or administrative history, including statements made by the decision making body."[188] Upon examining the record before it, which included statements made by city council members indicating that the council's goal was to prevent the Santeria church from opening in the City of Hialeah, the Court concluded that the ordinances were enacted "because of, not merely in spite of," their ability to prevent Santeria religious practice.[189]

Because the Court determined that the object of the city's several ordinances was to burden religious exercise, it found that the laws were not neutral and therefore applied strict scrutiny.[190] The *Lukumi* Court found that the burden of the city's ordinances fell almost entirely on the free exercise of practitioners of the Santeria religion.[191] The Court also found that, although the city had an interest in preventing animal cruelty, it could have achieved this goal through narrower means.[192] Before holding that the city's ordinances violated the

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[182] *Id.*

[183] *Id.*

[184] *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 536.

[185] *See id.* at 540.

[186] 429 U.S. 252, 266 (1977) (involving an equal protection challenge to city zoning laws).

[187] *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 540.

[188] *Id.*

[189] *Id.* (internal quotations omitted).

[190] *Id.* at 536–39.

[191] *Id.* at 536.

[192] *Id.* at 539.

First Amendment rights of members of the Lukumi church, the Court briefly noted that there was no need to determine the precise standard by which it should evaluate whether a statute fulfilled the requirement of general applicability.[193] Because the ordinances involved, in the Court's opinion, fell so far "below the minimum standard necessary to protect First Amendment rights," there was no need to analyze them against this element.[194]

What is interesting about the Court's analysis in *Church of the Lukumi Bablu Aye* is that it simultaneously reasserts the holding in *Smith* while pushing the Court to look more closely at the effects of the law in question before determining which level of scrutiny to use.[195] It seems likely, from the Court's own analysis, that the text of the city's ordinances itself was enough to prove that the ordinances were not neutral.[196] But the Court went further and examined both the effects of the ordinances on religious expression as well as the historical context of their passage *before* determining what level of scrutiny to apply.[197] While the *Lukumi* Court's approach is a tempered one—the Court makes clear that the adverse impact of a law on religious expression is not by itself enough to find that the object of the law is to restrict free exercise—it is in tension with the majority opinion in *Smith*.[198]

In his majority opinion in *Smith*, Justice Scalia dismissed the argument set forth in Justice O'Connor's concurrence that all laws that have the effect of burdening the free exercise of religion should be subject to analysis under strict scrutiny.[199] Comparing the Court's protection of religious expression under the First Amendment to its treatment of race under the Equal Protection Clause, Justice Scalia stated that the Court has declined to hold that "race-neutral laws that have the *effect* of disproportionately disadvantaging a particular racial group do not thereby become subject to compelling-interest analysis under the Equal Protection Clause [of the Fourteenth Amendment]."[200] Scalia declined to follow O'Connor's suggestion that the Court adopt a burdensome effects test for free exercise cases, a theory

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[193] *See Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 543.

[194] *See id.* at 543–44.

[195] *See supra* text accompanying notes 158–191.

[196] *See Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 535.

[197] *See id.* at 535, 540.

[198] *See id.* at 535; *supra* text accompanying notes 31–34.

[199] Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 886 n.3 (1990).

[200] *See id.* (citing Washington v. Davis, 426 U.S. 229 (1976)).

which the Supreme Court has explicitly rejected for cases involving challenges under the Fourteenth Amendment.[201]

Although the *Lukumi* Court's use of an adverse impact analysis, which is merely one part of another sub-component in the Court's neutrality analysis, does not amount to the same level of judicial sensitivity that Justice Scalia argued against in *Smith,* it does represent a slight departure from that position.[202] Furthermore, the weaving in of adverse impact analysis represents the kind of judicial creativity to which Professor Lupu refers.[203] The *Lukumi* Court's analysis could have a significant impact on challenges to land use statutes and schemes, should lower courts choose to follow the Supreme Court's lead and look behind the statutes themselves to the circumstances surrounding their enactments. In many cases, local ordinances are updated more frequently than state or federal laws and are more likely to reflect the current mood and concerns of the relevant electorate. The result is that a record of the proposal and adoption of such ordinances may be rich with relevance in cases of alleged religious hostility.

C. *Hybrid Rights Theory: The Exception That Threatens to Swallow the* Smith *Rule*

Another opportunity for judicial creativity in the area of free exercise jurisprudence can be found in the *Smith* opinion itself.[204] The *Smith* Court distinguished the facts in that case from earlier cases like *Wisconsin v. Yoder*[205] by arguing that such earlier cases represented situations involving "hybrid" rights.[206]

> The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the free exercise clause alone, but the free exercise clause in conjunction with other constitutional protections, such as

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[201] *See id.* (citing Washington v. Davis, 426 U.S. 229 (1976)).

[202] *See Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 535.

[203] *See* Lupu, *supra* note 105, at 580.

[204] *See id.* at 571.

[205] 406 U.S. 205 (1972). In *Yoder,* the Supreme Court upheld a challenge by Amish parents that state compulsory school attendance laws, requiring that they send their children to public schools, burdened their free exercise rights. *See generally id.*

[206] *Smith,* 494 U.S. at 882.

> freedom of speech and of the press . . . or the right of parents . . . to direct the education of their children . . . .[207]

This articulation of hybrid rights has led to considerable judicial activity in lower courts.[208]

In one recent case, *Tenafly Eruv Ass'n v. Borough of Tenafly,* the Court of Appeals for the Third Circuit indicated that the Supreme Court's articulation of a hybrid rights theory forced lower courts to be increasingly sensitive to challenges that implicate free exercise claims along with other constitutional rights.[209] *Tenafly Eruv Ass'n,* involved the enforcement of a facially neutral city ordinance prohibiting individuals from affixing signs or other materials to publicly owned utility poles against an Orthodox Jewish community that violated the ordinance for religiously motivated reasons.[210] With the assistance of the local cable company, the Tenafly Eruv Association attached thin, black strips of plastic, known as *lechis,* vertically to the city's utility poles in order to construct an *eruv* within the city.[211] An *eruv* is a symbolic demarcation of an area which facilitates the ability of Orthodox Jews to travel to synagogue on the Sabbath.[212] Although their faith prevents them from pushing or carrying objects outside of their homes on the Sabbath, Orthodox Jews may engage in such activity within the spatial boundaries of an *eruv.*[213] Upon learning of the association's actions, the city demanded the removal of the *lechis* marking off the *eruv,* although it had failed to previously enforce this ordinance against other residents who engaged in similar, but secularly motivated, activities.[214] The association sued the borough, asserting that the ordinance violated both its free exercise and free speech rights.[215]

The Appeals Court found that the association could not sustain its claim that the ordinance infringed on its free speech rights.[216] The association argued that the *lechis* that marked the *eruv*'s boundaries were so innocuous that even members of the Tenafly Orthodox community

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[207] *Id.* at 881.

[208] *See* Lupu, *supra* note 105, at 571; *see also supra* text accompanying notes 206–228.

[209] *See* 309 F.3d 144, 163 n.20 (3d Cir. 2002).

[210] *See id.* at 151.

[211] *Id.* at 152.

[212] *Id.*

[213] *Id.*

[214] *Id.* at 151 (stating that residents of Tenafly had previously attached directions to local churches, signs advertising missing pets, house number signs, Christmas holiday decorations, and orange ribbons to the utility poles without having the ordinance enforced).

[215] *Tenafly Eruv Ass'n,* 309 F.3d at 151.

[216] *Id.* at 165.

would not be able to recognize them for what they were; rather, knowledge of the *eruv* and its boundaries would be passed by word of mouth.[217] Because of this, the court determined that the act of affixing *lechis* to the utility poles was not "sufficiently imbued with elements of communication to be deemed expressive conduct" worthy of protection under free speech jurisprudence.[218] The court concluded that, in the absence of evidence that such demarcations convey an "attitude or belief," geographical boundary lines, like the *eruv* or fences and walls, were not expression protected by the First Amendment.[219]

In reaching this holding, the *Tenafly Eruv* court was obviously concerned with the implications of making it easier for plaintiffs bringing free exercise claims to allege an infringement of hybrid rights.[220] The court expressed concern that, by analyzing the construction of an *eruv* under the Free Speech Clause, it would set a precedent that would easily allow plaintiffs and courts to side-step the essential holding of *Smith*.[221] "Moreover, if solely the act of erecting a wall separating the interior of a building from the secular world constituted 'speech,' every religious group that wanted to challenge a zoning regulation preventing them from constructing a house of worship could raise a 'hybrid' rights claim triggering strict scrutiny."[222] Commentators have expressed similar concerns that *Smith*'s exemption for hybrid rights threatens to swallow the rule it creates.[223]

Both the Courts of Appeals for the Ninth and Tenth Circuits have also directly addressed the issue of how hybrid rights challenges affect a court's analysis under *Smith*.[224] In a case involving religious parents' desire to send their home-schooled child to public school part-time to take science and foreign language courses, the Tenth Circuit Court of Appeals held that *Smith*'s hybrid rights theory "at least requires a col-

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[217] *Id.* at 162.

[218] *Id.* at 161–62 (internal quotations omitted).

[219] *Id.* at 163.

[220] *Id.*

[221] *See Tenafly Eruv Ass'n*, 309 F.3d at 163.

[222] *Id.*

[223] *E.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 567 (1993) (Souter, J. concurring) ("If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule . . . ."); *see also* Castle Hills First Baptist Church v. City of Castle Hills, 2004 WL 546792, *7, *15 (W.D. Tex. Mar. 17, 2004) ("A plaintiff cannot establish a hybrid rights claim merely by combining a substantial free exercise claim with tenuous claims and mere allegations of violations of other rights.").

[224] *See* Miller v. Reed, 176 F.3d 1202, 1208 (9th Cir. 1999); Swanson v. Guthrie Indep. Sch. Dist. No. 1-L, 135 F.3d 694, 700 (10th Cir. 1998).

orable showing of infringement of recognized and specific constitutional rights, rather than the mere invocation of a general right such as the right to control the education of one's child."[225] Thus the court suggested that, in order for a hybrid rights theory to apply, the plaintiff must make a showing that both constitutional claims have a chance at success on the merits.[226] What is unclear from the court's language, however, is whether so-called "general rights," like the right of parents to control their child's education and up-bringing, will ever qualify for hybrid rights theory.[227] This is curious given Scalia's own invocation of this same right—the right to direct the education of one's children, as articulated in both *Wisconsin v. Yoder* and *Pierce v. Society of Sisters,* in first articulating the hybrid rights theory in *Smith.*[228]

A similar, but slightly broader, reading of the hybrid rights theory is offered by the Ninth Circuit Court of Appeals in *Miller v. Reed,* a case involving a claim that the California Department of Motor Vehicle's requirement that applicants provide their social security number to renew a driver's license violated both plaintiff's free exercise of religion and right to interstate travel.[229] The *Miller* court held that a claim of a hybrid rights violation required more than a "meritless claim of the violation of another alleged fundamental right or a claim of an alleged violation of a non-fundamental or non-existent right."[230] Thus the *Miller* court seems to suggest that, in order to qualify for the benefit of a hybrid rights analysis, the plaintiff's second claim must have merit and must be a claim of violation of a fundamental or existing right.[231]

D. *Does the RLUIPA Hinder or Enhance These Opportunities for Judicial Creativity?*

The RLUIPA has the potential to both enhance and to hinder opportunities for judicial creativity in free exercise jurisprudence. Thus far, courts have reacted to the Act in a manner which fails to consider other avenues for protecting religious free exercise. *Murphy v. Zoning Commission of the Town of New Milford,*[232] is one example of a missed opportunity to further explore the hybrid rights exemption created by

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[225] *Swanson,* 135 F.3d at 700.

[226] *See id.*

[227] *See id.*

[228] *See* Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 881–82 (1990).

[229] *See Miller,* 176 F.3d at 1204.

[230] *Id.* at 1208.

[231] *See id.*

[232] 148 F. Supp. 2d 173 (D. Conn. 2001).

Smith. As explained above, *Murphy* involved a challenge that a town zoning commission violated the plaintiff's First Amendment rights and the RLUIPA when it ordered the plaintiffs to suspend weekly prayer meetings held in their home, as the regularly scheduled meetings and subsequent parking over-flow violated town zoning ordinances.[233] Plaintiffs alleged that the town had violated both their right to free exercise of religion and their right to assembly.[234] Arguably, the plaintiff's claims provided an excellent opportunity for the court to address hybrid rights theory. Plaintiff Murphy's son testified that he and his father could not comply with the town's request that they limit their weekly prayer meetings to twenty-five people because "part of the purpose of the meetings was to help people in need and, if a twenty-sixth person needed the help of the prayer group, he did not want to turn that person away."[235] Such a claim appears to be a perfect confluence of fundamental rights under the *Smith* hybrid rights theory.

Although the *Murphy* court did apply strict scrutiny to the plaintiff's claim, the court did so solely on the grounds that the RLUIPA required it.[236] After the court determined that the town's enforcement of the zoning ordinance created a substantial burden on the plaintiff's free exercise of religion, the RLUIPA required it to apply strict scrutiny and determine whether the town's application of the ordinance represented a compelling interest, achieved through the least restrictive means.[237] Although the court ultimately granted the plaintiffs their request for a preliminary injunction, it did so by looking solely at the merits of the RLUIPA claim, ignoring the other constitutional challenges entirely.[238] This treatment of the plaintiff's claims seems to underscore Professor Lupu's point about judicial atrophy.[239] The RLUIPA's drafters were concerned about making sure the holding in *Smith* did not close the doors to religious free exercise in the area of land use disputes.[240] Thus, it follows that the RLUIPA's supporters should want to see more judicial exploration of areas of free exercise

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[233] *See supra* notes 148–150 and accompanying text.

[234] *Murphy*, 148 F. Supp. 2d at 175.

[235] *Id.* at 189.

[236] *See id.* at 189–90.

[237] *Id.*

[238] *Id.* at 190–91.

[239] *See supra* Part III.A.

[240] *See* 146 CONG. REC. S7774 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy) ("Churches in general, and new, small, or unfamiliar churches in particular, are frequently discriminated against on the face of zoning codes and also in the highly individualized and discretionary processes of land use regulation.").

doctrine left open to analysis under strict scrutiny, such as hybrid rights theory. The concern seems very real, however, that if judges can find for plaintiffs who assert that government has burdened a hybrid right involving free exercise under RLUIPA, they will follow the course of the *Murphy* court and ignore the possibility of evaluating these claims with strict scrutiny on constitutional grounds alone.

Whether or not the RLUIPA stifles judicial creativity is an important question because it is connected to the on-going debate about the most effective way to protect individual rights—through judicial or legislative action. For those, like Professor Lupu, who are concerned with the judicial development and protection of rights, courts' unwillingness to see past the main holding of *Smith* is troubling, and, one might argue, this judicial unwillingness is due to the fact that statutes like the RLUIPA are blocking their view.[241]

Although the *Tenafly Eruv* case did not involve a RLUIPA claim, the plaintiffs in that case did challenge the application of a local municipal ordinance, similar to most land use ordinances.[242] There, the court was unwilling to allow the plaintiffs to assert both a free exercise and a free speech claim, and seemed particularly concerned about the effect of a hybrid rights challenge on the level of scrutiny required.[243] One could argue that the court gave the Eruv Association's speech claim short shrift in order to avoid a hybrid rights analysis which, according to the holding of *Smith*, would require the court to evaluate the plaintiff's claim using strict scrutiny.[244] Such a result would certainly confirm Professor Lupu's worst anxieties about a decline in judicial creativity, as the *Tenafly Eruv* court seemed reluctant to take on the issue of hybrid rights, even when there was no religious liberty legislation involved.[245] Alternatively, the RLUIPA may not be as problematic as Professor Lupu and other commentators portend because it is so narrowly focused on issues of free exercise in the land

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[241] *See e.g.*, Elsinore Christian Ctr. v. City of Lake Elsinore, 291 F. Supp. 2d 1083, 1087 (C.D. Cal. 2003). Plaintiffs brought claims alleging that the city's denial of a conditional use permit violated the RLUIPA, the California state constitution, and the United States Constitution. *Id.* Because "[a] fundamental and long-standing principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them," the court asked the parties to initially focus their efforts on the plaintiff's RLUIPA claim alone. *Id.* (quoting Lyng v. N.W. Indian Cemetary Protective Ass'n, 485 U.S. 439, 445 (1988)).

[242] *See* Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144, 151 (2002).

[243] *See id.* at 163.

[244] *Id.* at 163; *see* Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 882 (1990).

[245] *See* discussion, *supra* Part III.A.

use and institutionalized persons contexts.[246] One way to examine this concern more closely is through the lens of recent RLUIPA litigation.

Supporters of the RLUIPA may argue that the statute will not have the effect of stalling judicial creativity in the area of free exercise jurisprudence because land use cases will only account for one segment of all cases involving challenges under the First Amendment. This is a difficult argument to make, however, because of the assertion on the part of the RLUIPA's drafters that enacting a statute targeting burdens on free exercise in the land use arena was essential since it was in this field where the most egregious violations of religious liberty occur.[247] If this is in fact the case, and the majority of free exercise challenges do occur in the land use context, then it seems especially important that judges not ignore opportunities for creativity in this realm.

IV. Comment: RLUIPA's Effect on the Struggle for and Attainment of Religious Freedom

The legislative history of the RLUIPA reveals that the statute is the result of considerable compromise on the part of its diverse supporters.[248] Because the RLUIPA is still young and has yet to be the subject of extensive litigation, it is difficult to determine whether the compromises that were necessary to the statute's passage will have the effect of preventing some from fully realizing the Act's promise to protect free exercise from the burdens of local land use regulation. Similarly, questions remain as to whether the RLUIPA truly achieves a level of protection for religious freedom that was unavailable under the Supreme Court's free exercise jurisprudence.

A. *Is Legislation the Correct Tool to Address the Problem of Religious Intolerance?*

Related to the issue of the RLUIPA's effect on judicial consideration of free exercise claims is the issue of the RLUIPA's effect on the politics surrounding efforts to ensure the protection of religious practice and expression through the legislative process.

The RLUIPA's detractors have been quick to suggest that, in addition to the Act's alleged unconstitutionality, it has the potential to create a new religious super-class, armed with the ability to avoid neu-

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[246] *See* discussion, *supra* Part III.A.

[247] *See id.*

[248] *See supra* notes 4–5 and accompanying text.

tral laws designed to protect the health, safety, and welfare of all members of society.[249] An examination of the RLUIPA's predecessor, the RFRA, however, indicates that such a characterization of the newer law may be inaccurate and undeserved.[250] Professor Lupu, who was among the RFRA's opponents, surveyed the statute's win-loss record after the Supreme Court's decision in *City of Boerne* and concluded that the RFRA did little to increase the success rate of plaintiffs involved in free exercise litigation.[251] He argues that the combination of the RFRA's "vague formula and judicial unwillingness to construe the statute in ways which would give it real bite." contributed to this effect.[252] The results under the RFRA, Professor Lupu claims, were not much different from those under traditional free exercise analysis in the post-*Smith* environment.[253] As a result of narrow constructions of the burdens placed on free exercise, government interests usually won out except in cases where the religious exercise claims were particularly strong or the government's interest particularly weak.[254]

Although he does not fear the creation of a religious super-class, Professor Lupu is concerned that religious liberty legislation, like the RLUIPA and the RFRA, will lead to an unhealthy politicization of the effort to protect religious liberty.[255] Pointing to the debates surrounding the enactment of the RFRA and subsequent congressional attempts to draft religious liberty legislation, Professor Lupu contends that arguments concerning the drafting of these pieces of legislation frequently breaks down along narrowly sectarian lines and over particularly explosive political issues, like abortion and homosexuality.[256] Looking at the RLUIPA's legislative history, it is apparent that similar problems arose again as Congress drafted this most recent legislative effort to protect religious expression.[257] The RLUIPA is the result of several compromises between the civil rights and religious communities.[258] Despite the concerns expressed by Professor Lupu that such debates over the fundamental character of our culture "are not the sort of battles for which ordinary politics are well-suited; they cannot

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[249] *See* Walsh, *supra* note 81, at 203–04.
[250] *See* Lupu, *supra* note 105, at 570.
[251] *Id.*
[252] *Id.*
[253] *Id.*
[254] *Id.*
[255] *Id.* at 568.
[256] *See* Lupu, *supra* note 105, at 583–84.
[257] *See supra* note 5.
[258] *See id.*

readily be compromised, should not be resolved on the basis of political strength, and encourage rather than soften sectarian animosities,"[259] the RLUIPA appears to have emerged from the legislative process without creating such difficulties. Professor Lupu's equally legitimate concern, however, that the politicization of religious freedom yields legislation formulated from the perspective of only the most vocal participants in the debate that creates it, has yet to be tested in the land use context.[260]

Because only a handful of land use cases have been brought under the RLUIPA, it is too early to tell whether the statute's formula creates an easier path for certain religious communities than for others. As a kind of response to Professor Lupu's concerns, however, one court has suggested that the value of legislation like the RLUIPA is that it puts government actors—and communities—on notice, and encourages them to more thoroughly examine the potential effects of land use regulation on religious congregations.[261] The *Castle Hills* court stated:

> The Court takes this opportunity to encourage Castle Hills and all other similarly situated communities to engage in thorough and positive debate and negotiation on the issues of zoning of religious organizations and places of worship, recognizing that in the arena of religion, all parties need trod lightly, out of respect for the beliefs of the adherents and out of respect for the importance of religion to our larger American culture. Cities must govern the health, safety and welfare of their communities, but in so doing, should consider carefully the positive and supportive role that a place of worship will play in doing so.[262]

Perhaps what the Castle Hills court suggests is not more legislation, however, but greater tolerance and a broader conception of our communities.

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[259] *See* Lupu, *supra* note 105, at 584.

[260] *See id.* at 583.

[261] *See* Castle Hills First Baptist Church v. City of Castle Hills, 2004 WL 546792 *7, *20 (W.D. Tex. 2004).

[262] *Id.*

B. *Another Way in Which the Act May Be Unnecessary: Does the Land Use Activity the RLUIPA Seeks to Protect Fall Within One of the Many Exemptions of* Smith?

Professor Lupu argues that the *Smith* holding has created a "new and potent set of exceptions" to its rule of rational basis review for all laws of general applicability which have the effect of burdening the free exercise of religion.[263] Among these are hybrid rights and systems of individualized assessment like the Supreme Court dealt with in *Sherbert v. Verner*.[264] These exceptions to the *Smith* rule are powerful because they guarantee that the challenged law or practice will be analyzed using strict scrutiny. Professor Lupu points out that:

> [R]egimes of more open-ended discretion are typically most vulnerable to the charge that they are being administered in ways hostile to religion or to particular religious sects. Accordingly, one would expect administrative schemes characterized by a high degree of discretion—zoning schemes are the leading candidate—to forfeit the benefit of the *Smith* rule because such schemes fall into one or more exceptions to that rule.[265]

Thus his argument goes, zoning schemes should not be subject to *Smith*'s rule of rational basis review because they are inherently discretionary, and are therefore *not* laws of general applicability.[266]

This is important for two reasons. First, such a conception of the effect of the *Smith* holding on zoning and land use laws goes a long way toward making the argument for the RLUIPA's constitutionality. The problem with the RLUIPA's predecessor, the RFRA, as expressed by the Supreme Court in *City of Boerne*, was that Congress had created a statute that did not respect the law of *Smith*.[267] The RLUIPA's detractors argue that the statute suffers from the same infirmities and is therefore a violation of Congress's power under Section Five of the Fourteenth Amendment.[268] If the RLUIPA's treatment of zoning and land use laws can be reconciled with the Court's decision in *Smith*,

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[263] *Id.* at 572.
[264] *See id.*
[265] *Id.* at 573.
[266] *See id.*
[267] *See supra* Part II.
[268] *See supra* Part II.B.

however, there is no constitutional infirmity as far as Congress's remedial powers go.[269]

Second, assuming that the RLUIPA is not an expansion of the First Amendment right to free exercise of religion, but merely a codification of the Supreme Court's *Smith* holding as it applies to land use regulation, one may wonder why the statute is necessary at all. One suggestion is that the RLUIPA gives lawyers and judges another way to frame claims arising out of the conflict between local zoning and land use ordinances and the free exercise of religious beliefs. While Professor Lupu's arguments about judicial atrophy are compelling, there is also a legitimate concern that courts will be unwilling to develop the exceptions *Smith* creates. This may have been the case in *Tenafly Eruv Ass'n,* where the court was unwilling to recognize the plaintiff's free speech claim, and therefore their hybrid rights theory, in part because of some reluctance to address that element of *Smith.* In these cases, the RLUIPA may provide courts with the least controversial way of applying strict scrutiny to land use laws alleged to burden religious freedom.

Conclusion

The RLUIPA is an attempt on the part of Congress to prevent local land use laws from infringing on First Amendment rights. Because of its concern that religious groups faced the most hostility in the highly discretionary environment of land use and zoning administration, Congress chose to narrow its focus to such situations when drafting the RLUIPA, its most recent attempt to elucidate the Supreme Court's holding in *Smith.* The effect of the law is an atmosphere in which religious liberty is more easily protected by courts uncertain of how far to push the limits of *Smith,* at some expense to judicial creativity in free exercise jurisprudence. Although the statute may go far in its goal of circumscribing a paradigm of cases—free exercise claims involving land use schemes—it simultaneously limits the number of opportunities courts will have to flex their judicial muscles and expand the scope of religious protection in cases which do not involve land use.

[269] This does not mean, however, that the statute is impervious to attacks under the Spending Clause and the Commerce Clause.